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IN THE

Supreme Court of the United States

RAJAH BAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether more than a de minimis impact on interstate commerce is required for a robbery to serve as the basis for a conviction under the Hobbs Act.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files amicus curiae briefs on a broad range of issues in this Court and other courts.

INTRODUCTION

The Court should grant the petition and review this case because allowing a robbery's de minimis impact on interstate commerce to suffice as grounds for a Hobbs Act conviction is contrary to this Court's Commerce

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Pursuant to Rule 37.2(a), counsel provided all parties with notice of amicus curiae's intention to file this brief more than 10 days prior to the brief's due date. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

Clause jurisprudence. Moreover, such a rule inappropriately federalizes local crime.

The Hobbs Act forbids "in any way or degree obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, by robbery." 18 U.S.C. § 1951(a). The criminal conduct at issue in this case—stealing $538 from a Little Caesar's restaurant in Cleveland, Ohio—had at most a de minimis effect on interstate commerce. The restaurant bought supplies from a distributor in Columbus, Ohio, that in turn purchased them from businesses in other states; yet how much of the $538 might have—eventually—made its way into interstate commerce was not demonstrated. Nevertheless, the Sixth Circuit determined that no more than a de minimis impact on interstate commerce had to be shown to sustain the conviction. Pet. App. 5a.

Congress may use its Commerce Clause authority to regulate activity that substantially affects interstate commerce. *See, e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). However, in determining whether an activity actually does substantially affect interstate commerce, the effects of the entire class of activity can only be aggregated if the activity is itself "economic." *Id.* at 25; *United States* v. *Morrison*, 529 U.S. 598, 612-13 (2000). The robbery in this case, like any other robbery, was not itself an economic activity involving the production, distribution, or consumption of commodities. Because this individual robbery did not substantially affect interstate commerce, it was not a proper basis for a federal Hobbs Act prosecution.

The Sixth Circuit's decision—allowing the Hobbs Act to encompass robberies with a de minimis effect on interstate commerce—thus conflicts with this Court's

holdings in *Raich* and *Morrison*. Yet the importance of this issue goes beyond this case or even Hobbs Act cases in general. Other federal criminal statutes include similar jurisdictional elements that proscribe conduct based on an effect on interstate commerce. Even post-*Raich*, lower courts are split on the extent to which non-economic conduct must affect interstate commerce in order to fall within the reach of these statutes. This case presents an opportunity for the Court to resolve the confusion and reiterate that when Congress attempts to regulate activity on the basis that it substantially affects interstate commerce, the effects of non-economic conduct may not be aggregated in order for that conduct to fall within the scope of the prohibition.

Moreover, the de minimis rule applied by the Sixth Circuit inappropriately allows federal prosecutors to bring federal charges in cases that have no distinctly federal interest at stake. Such a rule permits Hobbs Act prosecutions based on robberies that had no greater effect on interstate commerce than most robberies prosecuted under state law. Thus, defendants committing indistinguishable offenses with de minimis interstate effects may face significantly different consequences depending on whether they happen to be charged in a state or federal forum. Not only does this practice create seemingly random disparities in sentencing, but it essentially reduces federalism in the criminal justice system to a matter of prosecutorial discretion. The Court should grant the petition in this case in order to reject the de minimis rule and ensure that federal Hobbs Act prosecutions are limited to offenses that actually affect the federal interest in protecting interstate commerce.

REASONS FOR GRANTING THE WRIT

I. THE DE MINIMIS RULE CONFLICTS WITH THIS COURT'S CLEAR GUIDANCE ON CONGRESS'S COMMERCE CLAUSE POWERS

The Court should grant the petition for review because the Sixth Circuit's analysis conflicts with this Court's firmly established Commerce Clause jurisprudence. Under *Gonzales* v. *Raich*, 545 U.S. 1 (2005) and *United States* v. *Morrison*, 529 U.S. 598 (2000), Congress may use its authority under the Commerce Clause to regulate *non-economic* intrastate activity—including crimes such as robbery—only to the extent that individual instances of that activity substantially affect interstate commerce. Thus, an individual robbery's de minimis impact on interstate commerce is insufficient to serve as a basis for a criminal conviction under the federal Hobbs Act.

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. As noted in *Raich*, this Court's "understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time." 545 U.S. at 15-16. Despite this evolution, the Court has consistently found that the Commerce Clause provides Congress with the power to engage in three categories of regulation. "First, Congress can regulate the channels of interstate commerce." *Id.* at 16 (citing *Perez* v. *United States*, 402 U.S. 146, 150 (1971)). "Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce." *Id.* at 16-17 (citing *Perez*, 402 U.S. at 150). "Third, Congress has the power to regulate activities

that substantially affect interstate commerce." *Id.* at 17 (citing *Perez*, 402 U.S. at 150, and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

In *Raich* and *Morrison*, as in this case, only the third category of Commerce Clause regulation was relevant: regulation of activities that substantially affect interstate commerce. 545 U.S. at 17; 529 U.S. at 609. Where the Court has "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 529 U.S. at 611. Accordingly, Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617.

In *Morrison*, the Court struck down a federal statute that imposed civil liability on anyone committing "crimes of violence motivated by gender." 529 U.S. at 605, 617. While not explicitly defining the scope of "economic" activity, the Court stated that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. The Court thus rejected the contention that Congress could regulate gender-motivated violence under the Commerce Clause, even though Congress found that such violence would have an impact on various aspects of interstate commerce. *Id.* at 614.

This critical distinction between economic and non-economic activity was decisive in *Raich*, the most recent case in which this Court has addressed the limits on Congress's Commerce Clause powers. In that case, the Court considered the validity of portions of the Controlled Substances Act (CSA), 21 U.S.C. §§ 801 *et seq.*, that prohibited the cultivation or possession of

marijuana. *Raich*, 545 U.S. at 12-15. A group of marijuana users and growers in California argued that Congress lacked the power to apply the CSA's prohibitions to non-commercial, intrastate cultivation or possession of marijuana for medical purposes. *Id.* at 15.

The Court upheld the CSA's prohibitions as a valid exercise of Congress's power to regulate activities substantially affecting interstate commerce. 545 U.S. at 32-33. As the Court explained, Congress can regulate "purely local activities" if those activities are part of "an economic 'class of activities'" that in the aggregate has "a substantial effect on interstate commerce." *Id.* at 17. Accordingly, where Congress passes a general regulatory statute governing activities that as a class are within the reach of federal power, the regulatory regime properly governs even trivial or de minimis individual instances within that class of activities. *Id.* at 17, 23.

The Court found that because the CSA had the purpose of "control[ling] the supply and demand of controlled substances in both lawful and unlawful drug markets," Congress could legitimately regulate even intrastate activity under its Commerce Clause power. 545 U.S. at 19. "[T]he regulation is squarely within Congress' commerce power because production of [a] commodity meant for home consumption ... has a substantial effect on supply and demand in the national market for that commodity." *Id.* In other words, because the CSA created "a comprehensive framework for regulating the production, distribution, and possession" of controlled substances, *id.* at 24, even "trivial" individual activities subject to that framework would not be exempt from federal regulation, *id.* at 23.

Notably, the Court explicitly premised its holding on the "economic" nature of the activities regulated by the CSA. Filling in a doctrinal gap that had remained after *Morrison*, the Court defined the scope of "economic" activity for Commerce Clause purposes as "'the production, distribution, and consumption of commodities.'" 545 U.S. at 25 (quoting *Webster's Third New International Dictionary* 720 (1966)). Because "the activities regulated by the CSA are quintessentially economic," the Court found that the CSA was not subject to the same constitutional infirmities that doomed the civil statute in *Morrison*. *Id.* at 25-26.

The contrast between *Raich* and *Morrison* makes clear that Congress's ability to regulate activities with a substantial effect on interstate commerce applies much more broadly to economic activities than to non-economic activities. If criminal activity involves "the production, distribution, and consumption of commodities," 545 U.S. at 26, Congress can regulate that activity—even at the intrastate level—based on the aggregate effect of the activity on interstate commerce, *id.* at 18-19; *Morrison*, 529 U.S. at 611. Individual instances of such economic activity are still subject to regulation, even if they appear trivial or de minimis. *Raich*, 545 U.S. at 17, 23. However, non-economic criminal activity—crimes not involving "the production, distribution, and consumption of commodities," *id.* at 26—cannot be regulated by Congress based solely on that activity's aggregate effect on interstate commerce, *id.* at 25-26; *Morrison*, 529 U.S. at 617.

The criminal activity in *Raich* was "quintessentially economic" because it involved "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." 545 U.S. at 26. Congress's regulation of intra-

state activity was proper because "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Id.*

By contrast, robbery cannot be accurately described as an "economic" activity under the definition set forth in *Raich*.[2] The Hobbs Act defines robbery as follows:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1). The Act thus regulates the use of force, violence, or fear of injury to obtain any sort of personal property from another individual. On its own, the use of force, violence, or fear of injury would have no connection to the "production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 26. The only way that robbery under the Hobbs Act could even

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[2] While Courts of Appeals have occasionally stated that they consider robbery to be an "economic" crime, it appears that none of them has reached this conclusion based on the definition of "economic" activity that was critical to the holding in *Raich*. *See, e.g.*, *United States* v. *Jimenez-Torres*, 435 F.3d 3, 7-8 (1st Cir. 2006); *United States* v. *Malone*, 222 F.3d 1286, 1295 (10th Cir. 2000). Moreover, even where robbery involves a transfer of money, the crime does not inherently have an effect on interstate commerce. *See, e.g.*, *United States* v. *Wang*, 222 F.3d 234, 240 & n.2 (6th Cir. 2000) (finding that "the effect ... did not rise even to the level of de minimis" when $4,200 was taken during a robbery).

theoretically be considered an "economic" activity under *Raich* is if depriving the victim of "personal property" would be considered the "distribution" of a "commodity." Yet "personal property" is not a commodity regulated by Congress. While the CSA provisions in *Raich* were part of a comprehensive regulation of the controlled substances market, the Hobbs Act is not part of "a comprehensive framework for regulating the production, distribution, and possession" of personal property. *Id.* at 24. While robbery may have superficial similarities to voluntary transactions, in that an item shifts from one person's possession to another's, no "national market" in personal property is being affected. Robbery fails to qualify as an "economic" activity under *Raich*.

Thus, because robbery does not meet *Raich*'s definition of economic activity, the effects of all robberies nationwide cannot be aggregated in order to determine whether "robbery" as a category substantially affects interstate commerce. While Congress can regulate robbery that does substantially affect interstate commerce, that attempt at regulation cannot simply extend to all robberies at the intrastate level, regardless of the impact each robbery has on interstate commerce. *See Morrison*, 529 U.S. at 617 (stating that Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"). As a non-economic activity, each individual robbery must itself have some substantial impact on interstate commerce in order to fall subject to Congressional regulation.

Allowing an individual robbery's "de minimis" impact on interstate commerce to serve as the basis for a Hobbs Act conviction, as the Sixth Circuit did in this case, is therefore inconsistent with this Court's analysis

of Congress's Commerce Clause authority. The petition for certiorari should be granted so that the Court may clarify to lower courts that, under the definition set forth in *Raich*, robbery is a non-economic activity. A robbery that does not itself substantially affect interstate commerce—such as taking $538 from a Little Caesar's in Cleveland, especially when the restaurant buys its supplies from a distributor elsewhere in Ohio—is therefore not subject to federal prosecution.

II. Lower Courts Have Split On Whether The De Minimis Rule Can Apply Under Federal Criminal Statutes That Require An Effect On Interstate Commerce

As the above discussion demonstrates, the Constitution does not allow a Hobbs Act conviction to be premised on a robbery with a de minimis impact on interstate commerce. The need for greater clarity on this issue is not confined merely to Hobbs Act prosecutions, however. Numerous other federal criminal statutes, a few of which are discussed in this section, include similar jurisdictional elements that require some level of impact on interstate commerce in order to sustain a conviction. However, lower courts have at times split on the question of whether more than a de minimis impact is required for these statutes to be constitutionally applied to non-economic activity. Courts construing these statutes often explicitly rely on Hobbs Act cases in analyzing the extent to which interstate commerce must be affected. *See, e.g.*, *United States* v. *Fernandez*, 388 F.3d 1199, 1218 (9th Cir. 2004); *United States* v. *Riddle*, 249 F.3d 529, 537 (6th Cir. 2001); *United States* v. *Grassie*, 237 F.3d 1199, 1208-1209 (10th Cir. 2001); *United States* v. *Feliciano*, 223 F.3d 102, 118 (2d Cir. 2000); *United States* v. *Juvenile Male*, 118 F.3d 1344,

1347-1348 (9th Cir. 1997). Thus, granting the petition in this case will allow the Court to provide guidance on the proper application of the de minimis rule and resolve the lower courts' confusion.

A. Racketeer Influenced And Corrupt Organizations (RICO)

The federal RICO statute, 18 U.S.C. § 1962, prohibits a variety of actions related to "pattern[s] of racketeering activity." For example, anyone who has received income derived from a pattern of racketeering activity cannot use that income to acquire an interest in an enterprise that is engaged in or affecting interstate commerce. *Id.* § 1962(a). No one may use a pattern of racketeering activity to acquire or maintain an interest in, or control of, an enterprise that is engaged in or affecting interstate commerce. *Id.* § 1962(b). Additionally, no one employed by or associated with an enterprise that is engaged in or affecting interstate commerce may participate in the conduct of that enterprise's affairs through a pattern of racketeering activity. *Id.* § 1962(c).

The scope of the RICO prohibitions are potentially quite broad, as demonstrated by the definitions of several relevant terms. "[R]acketeering activity" includes a long and varied list of dozens of federal offenses, such as bribery, fraud, false statements in passport applications, retaliation against witnesses, and trafficking in persons. 18 U.S.C. § 1961(1). However, racketeering activity also includes certain offenses chargeable under state law, including "murder, kidnapping, gambling, ar-

son, robbery, bribery, [and] extortion." *Id.*[3] Moreover, the definition of "enterprise" includes not just legal entities such as corporations and partnerships, but also "any ... group of individuals associated in fact although not a legal entity." *Id.* § 1961(4).

Thus, the innumerable possible combinations of "racketeering activities" and "enterprises" include many pairings that would feature no "economic" activity under the *Raich* definition. For example, many of the state law offenses, such as murder and kidnapping (and, as discussed above, robbery) do not involve the "production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 26. Similarly, a wide variety of "group[s] of individuals associated in fact"—deemed "enterprises" for RICO purposes—might often have no economic component to their organizational activities; groups ranging from street gangs to church choirs can easily exist without participating in the economy as associations.

In some instances, then, the RICO offenses listed in Section 1962 could prohibit non-economic racketeering activity from occurring in connection with a non-economic enterprise. For example, under the language of Section 1962(c), an individual "associated with" a street gang could be prosecuted for "participat[ing] ... in the conduct of" that gang's activities through a pattern of murders. *E.g.*, *Waucaush* v. *United States*, 380 F.3d 251, 253 (6th Cir. 2004) (internal quotation marks omitted). At the same time, the RICO offenses all require that some tie to interstate commerce be demonstrated--i.e., a showing that the enterprise either en-

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[3] A "pattern of racketeering activity" must involve at least two separate acts of racketeering activity within a ten year period. 18 U.S.C. § 1961(5).

gaged in or affected interstate commerce. While the RICO statute does not specify the degree to which an enterprise must affect interstate commerce, the Constitution requires a substantial effect on commerce in order for federal regulation to be appropriate. *Raich*, 545 U.S. at 17. Moreover, where non-economic activity is involved, *Raich* and *Morrison* require that individual instances of the prohibited activity must *each* substantially affect interstate commerce; such activity may not be viewed in the aggregate to determine whether it substantially affects interstate commerce. *Id.* at 25-26; *Morrison*, 529 U.S. at 617.

The Sixth Circuit recognized this requirement in *Waucaush*, in which it addressed RICO charges premised on non-economic gang activity, including murders. 380 F.3d at 253, 256. The court stated that "where the enterprise itself did not engage in economic activity, a minimal effect on commerce will not do." *Id.* at 256. The court found no evidence that the gang's activities had "substantial effects on interstate commerce," even though the murders "surely affected interstate commerce in some way—a corpse cannot shop, after all." *Id.* at 258. Accordingly, no violations of RICO had occurred. *Id.*

However, the First Circuit, while "reluctant to create a circuit split," rejected the *Waucaush* analysis and held that all racketeering activity may be aggregated for Commerce Clause purposes. *United States* v. *Nascimento*, 491 F.3d 25, 30, 43 (1st Cir. 2007). Like *Waucaush*, this case also involved a pattern of murders by a gang that did not engage in any "economic" activity as a gang. *Id.* at 30-31, 37. Yet the First Circuit found the absence of "an economic motive" to be "of little significance," stating that Congress can criminalize an economic "'class of conduct'" regardless of the "'economic

facts'" of individual conduct falling under the statute. *Id.* at 42 (emphasis omitted) (quoting *United States* v. *Morales-de Jesús*, 372 F.3d 6, 18 (1st Cir. 2004)). The court asserted that "[r]acketeering activity, as a general matter, is based largely on greed." *Id.* at 43 (citing 1 *Timothy* 6:10 ("[T]he love of money is the root of all evil.")). The Court therefore found that the "class of [racketeering] activity is sufficiently economic in nature that it may be aggregated for Commerce Clause purposes." *Id.* (citing *Perez*, 402 U.S. at 154).

Granting the petition in this case would allow the Court to resolve the conflict between lower courts by clarifying that a de minimis effect on interstate commerce cannot support a conviction premised on non-economic activity.

B. Civil Disorder

An effect on interstate commerce is also an element of 18 U.S.C. § 231, which prohibits a variety of actions in connection with civil disorder. For example, the statute forbids teaching or demonstrating any "technique capable of causing injury or death to persons, knowing ... that the same will be unlawfully employed for use in ... a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce." *Id.* § 231(a)(1). Similarly, the statute also prohibits interfering with any fireman or law enforcement officer engaged in his official duties "during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce." *Id.* § 231(a)(3).

Lowers courts have not shed much light on the extent to which a civil disorder must affect interstate commerce in order for regulation under this section to be a valid exercise of Congress's Commerce Clause

powers. *See, e.g., United States* v. *Featherston*, 461 F.2d 1119, 1123 (5th Cir. 1972) ("The argument that Congress exceeded its power under the Commerce Clause in enacting § 231(a)(1) fails to rise to the level of a substantial constitutional question and is rejected.") (citing *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964)). However, a "civil disorder" does not self-evidently involve the "production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 26. Similarly, many of the activities that this section purports to proscribe do not meet *Raich*'s definition of economic activity, such as teaching a "technique capable of causing injury" or interfering with a law enforcement officer. Under *Raich* and *Morrison*, therefore, Congress cannot regulate such non-economic activities based solely on their aggregate impact on interstate commerce. *Raich*, 545 U.S. at 25-26; *Morrison*, 529 U.S. at 617. Instead, each instance of non-economic conduct must substantially affect interstate commerce in order for this statute to validly prohibit it.

Thus, the de minimis rule used by some courts in Hobbs Act and RICO cases would also be improper for some prosecutions brought under § 231. The Court should grant the petition in this case to clarify that non-economic activity cannot be aggregated in order to determine whether the activity substantially affects interstate commerce.

C. Damage To Religious Property; Obstruction Of Persons In The Free Exercise Of Religious Beliefs

Under 18 U.S.C. § 247(a)(1), "intentionally defac[ing], damag[ing], or destroy[ing] any religious real property, because of the religious character of that property" is a crime if the offense "is in or affects inter-

state or foreign commerce," *id.* § 247(b). Similarly, "intentionally obstruct[ing], by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs" is a crime under § 247(a)(2), if the offense "is in or affects interstate or foreign commerce," *id.* § 247(b). Citing Hobbs Act case law, at least one Court of Appeals has opined that § 247 proscribes conduct that has only a de minimis effect on interstate commerce. *See Grassie*, 237 F.3d at 1208-1209.

Like the Hobbs Act, § 247 does not criminalize any economic activity involving the "production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 26. Rather, the statute addresses only property damage and interference with religious practices. Thus, when conduct falls within § 247 because it "affects" interstate commerce (rather than because it "is in" commerce), that non-economic activity cannot be aggregated in order to determine whether congressional regulation is proper. *Cf. United States* v. *Ballinger*, 395 F.3d 1218, 1227 & n.4 (11th Cir. 2005) (en banc) (finding that a string of church arsons were "in" interstate commerce and thus declining to "address the question ... of whether any effects the church burnings might have on commerce may be aggregated" to determine if commerce was "*affected*").

More than a de minimis effect on interstate commerce must therefore occur before an individual violation of § 247 can be reached by Congress's Commerce Clause power. By granting the petition and clarifying the impact on interstate commerce that is required under the Hobbs Act, this Court would provide valuable guidance to lower courts applying § 247.

III. The De Minimis Rule Grants Federal Prosecutors Inappropriate Discretion

The Constitution does not allow a non-economic activity's de minimis impact on interstate commerce to serve as the basis for a conviction under the Hobbs Act (or the other federal statutes discussed in Section II). This rule is more than just a mere doctrinal wrinkle in cases such as *Raich* and *Morrison*—it is a necessary principle for constraining federal prosecutions to their proper role in the American criminal justice system. Abandoning this rule by permitting de minimis effects on interstate commerce to create federal jurisdiction over non-economic crimes would grant prosecutors inappropriate discretion over matters of federalism and uniformity in punishment.

In general, "preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson* v. *New York*, 432 U.S. 197, 201 (1977) (citing *Irvine* v. *California*, 347 U. S. 128, 134 (1954) (plurality opinion)). To preserve this relationship between the components of the criminal justice system, the creation of a criminal offense under federal law should be accompanied by "an identification of the strong national interest that requires a federal prohibition." Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L. J. 825, 840 (2000). When no "distinct federal interest" exists to justify the federal statute, or when the statute encompasses additional conduct unrelated to the federal interest, then "the decision to prosecute can lack a guiding federal principle. ... Restraint is essentially left to self-imposed prosecutorial discretion." American Bar Ass'n, Criminal Justice Section, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 33 (1998).

In the case of the Hobbs Act, which is premised on Congress's Commerce Clause authority, the statute's purpose was "to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). Because robbery is a non-economic activity, Congress can only regulate that activity when it has a substantial effect on interstate commerce, as discussed in Section I. *Raich*, 545 U.S. at 25-26; *Morrison*, 529 U.S. at 617. If this constitutional limit is not enforced, and the de minimis rule is allowed to stand, prosecutors will be able to bring federal charges under the Hobbs Act where no discernable interference with interstate commerce actually occurred.

In such cases—including this one—no distinct federal interest in prosecution is evident. Even when these cases are tried in federal courts, they serve no purpose that is different from prosecutions by state authorities. If the Court condones this state of affairs, "federalism concerns would become part of prosecutorial discretion." Brown, *Constitutionalizing the Federal Criminal Law Debate:* Morrison, Jones, *and the ABA*, 2001 U. Ill. L. Rev. 983, 990. Yet prosecutorial discretion inherently takes into account factors other than constitutional concerns about federalism, such as a case's deterrent value and the government's enforcement priorities. *See, e.g., Wayte* v. *United States*, 470 U.S. 598, 607 (1985). Thus, even though the Department of Justice has instituted policy guidelines for bringing Hobbs Act robbery prosecutions, those guidelines reflect the Department's own priorities: "The robbery offense in 18 U.S.C. § 1951 is to be utilized only in instances involving organized crime, gang activity, or wide-ranging schemes. In certain circumstances [i.e., labor-management disputes], the appropriate section of

the Criminal Division must be consulted before prosecution is initiated." U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-131.040 (1997). Notably, this policy statement fails to restrict prosecutions to those robberies having a discernable effect on the real federal interest behind the statute—namely, the protection of interstate commerce. Unsurprisingly, prosecutorial guidelines cannot replace courts as adequate guarantors of limits on federal prosecutions of local robberies.

Moreover, when federal prosecutors bring Hobbs Act charges based on events that had no more than a de minimis impact on interstate commerce, some other factor will necessarily be motivating the decision to bring federal charges. At times, individual cases may be deemed worthwhile uses of federal resources if particularly dangerous or egregious (though purely intrastate) conduct is involved. American Bar Ass'n 34-35; Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L. J. 979, 1001 (1995). Additionally, ambitious prosecutors might pursue federal charges in "highly visible" cases regardless of whether the impact on interstate commerce is any greater than in "less glamorous" incidents. American Bar Ass'n 26.

At times, when Hobbs Act prosecutions are not restricted to those robberies substantially affecting interstate commerce, defendants may be selected to face federal charges essentially at random—such as when federal prosecutors agree to take cases in order to help their overburdened colleagues at the state level. Beale 1001 n.92. Yet the decision to bring federal Hobbs Act charges rather than state robbery charges is not merely a reallocation of work between two lawyers. "A citizen prosecuted for a state crime is subject to a set of consequences appreciably different than one prose-

cuted for a federal crime": different procedural and evidentiary rules apply, different officers investigate, different accountability mechanisms rein in prosecutors, and different trial judges will preside over—and different appellate judges review—the trial proceedings. American Bar Ass'n 29. While the existence of overlapping systems of prosecution will inevitably lead to some disparities in treatment for defendants subject to parallel charges, those disparities are tolerable when "carefully considered, principled, and limited in amount," *id.* at 32, rather than "a kind of cruel lottery" with no relation to culpability, Beale 997.

Most notably, "defendants prosecuted in federal court receive significantly different—and usually higher—sentences than they would have if they, like many others, had been prosecuted for the same conduct in state court." Beale 996. The Hobbs Act itself authorizes sentences of up to twenty years' imprisonment. 18 U.S.C. § 1951(a). Ohio law, however, provides for sentences of only three to ten years for first degree felonies, including aggravated robbery. Ohio Rev. Code Ann. §§ 2929.14(A)(1), 2911.01(C). Selecting some defendants accused of robberies to face federal charges when their crimes caused no substantial impact on interstate commerce therefore risks undermining one of the tenets of federal sentencing policy—"the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Seeking tougher sentences may at times motivate federal prosecutions of crimes that would otherwise simply be state matters. Limiting Hobbs Act prosecutions to robberies with a discernable effect on interstate commerce, as the Constitution requires, thus also serves the "important purpose of preventing forum shopping,"

Rumsfeld v. *Padilla*, 542 U.S. 426, 447 (2004), a vice no less objectionable when it is committed by prosecutors, *see, e.g.*, *United States* v. *Johnson*, 323 U.S. 273, 275 (1944).

The Court should therefore grant the petition and clarify that when non-economic activity is criminalized pursuant to Congress's Commerce Clause powers, some real impact on interstate commerce is necessary to justify a federal prosecution. Otherwise, only prosecutorial discretion is left to ensure that federal charges are brought only in cases where they would vindicate the federal interest in protecting interstate commerce.

CONCLUSION

Because the Sixth Circuit's decision conflicts with *Raich* and *Morrison*, thereby allowing the Hobbs Act and other federal statutes to reach conduct falling outside Congress's Commerce Clause authority, the petition for review should be granted.

Respectfully submitted.

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